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In The

Supreme Court of the United States

October Term, 1998

LOWER TULE RIVER IRRIGATION DISTRICT, et al.,

Petitioners,

vs.

NATURAL RESOURCES DEFENSE COUNCIL, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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REPLY TO BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

I.

INTRODUCTION

The "Brief for the Federal Respondents in Opposition" ("Federal Brief"), contains nothing that should dissuade this Court from reviewing the three issues of national significance raised by this case. These issues are: (1) the exercise by Congress in the Central Valley Project Improvement Act ("CVPIA") of its authority to preclude the application of state law by clear statutory directive; (2) the scope of the consultation obligation of the Endangered Species Act ("ESA"); and (3) whether the implementation of that consultation requirement and a resultant no jeopardy finding moot a procedural violation of the consultation requirements, rendering remedial action unnecessary.

Despite agreeing with Petitioners that the Ninth Circuit *incorrectly decided* these issues, Federal respondents nevertheless suggest that the Supreme Court should not grant certiorari in this case. However, the Federal Brief offers no convincing basis for the denial of review. In fact, since Federal respondents agree with Petitioners' substantive arguments, the Federal Brief actually supports Petitioners' argument that certiorari should be granted.

II.

FEDERAL RESPONDENTS AGREE THAT THE NINTH CIRCUIT ERRED IN CONCLUDING THE BUREAU OF RECLAMATION BREACHED ITS ENDANGERED SPECIES ACT OBLIGATIONS

Federal respondents clearly articulate their disagreement with the Ninth Circuit's decision that the Bureau of Reclamation ("Bureau") breached its ESA obligations:

> "In the instant case, NMFS concluded that consultation specifically directed to the Friant Unit contracts was unnecessary because any indirect adverse effects of Friant Unit contract renewals on the listed salmon could adequately be addressed in a larger ongoing consultation on the CVP as a whole. Pet. App. 230; see note 7, *supra*. In our review, that determination was well within NMFS's considerable range of discretion. In light of that determination by the wildlife agency having jurisdiction over the listed salmon species, the Bureau did not behave arbitrarily in declining to make further efforts to initiate formal consultation with respect to the contracts themselves. (Footnote omitted.)" (Federal Brief at 21.)

This is precisely the issue raised by the Petition for Writ of Certiorari. Federal respondents, however, go on to conclude that this Court need not review the Ninth Circuit's decision because the Ninth Circuit "did not purport to issue any broad pronouncement concerning the nature of the procedural obligations imposed by the ESA." (Federal Brief at 22.) Although Federal respondents no doubt have their own reasons for seeking to construe the Ninth Circuit's decision narrowly, the Ninth Circuit's decision, itself, includes no language expressly narrowing its application. To the contrary, the Ninth Circuit's opinion states that in relying on the opinion of the National Marine Fisheries Service ("NMFS") "the Bureau did not meet its independent responsibilities under the ESA. The Bureau had an affirmative duty to ensure that its actions did not jeopardize endangered species. . . . " (Appendix at 20.)

Petitioners are concerned that there is no indication from the Ninth Circuit's opinion that it applies only to the facts of the instant case. Furthermore, it is hard to conceive that the Ninth Circuit's opinion would not be construed by some as precedential authority for future

agency actions under the ESA. Thus, Federal respondents' brief offers no basis for this Court to not grant certiorari, and its concurrence with Petitioners' position is further reason for this Court to make such a grant and use this opportunity to clarify the confusion created by the Ninth Circuit decision.

III.

FEDERAL RESPONDENTS SUPPORT PETITIONERS' POSITION THAT THE NINTH CIRCUIT ERRED IN RULING THAT RESCISSION WAS THE SOLE AVAILABLE REMEDY

Federal respondents also disagree with the Ninth Circuit's affirmance of the district court's decision rescinding nine of the Friant Unit renewal contracts because the contracts were executed before the FWS issued its biological opinion. Federal respondents base their position in part on *Weinberger v. Romero-Barcello*, 456 U.S. 305, 313 (1982), the same case cited by Petitioners, for the proposition that "[t]he grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." (Federal Brief at 17.) Federal respondents continue:

> "Well before the district court rendered its decision in this case, the FWS issued a biological opinion stating that renewal of the pertinent contracts would not jeopardize the continued existence of species falling within that agency's jurisdiction. Neither of the courts below cast doubt upon the adequacy of that biological opinion. Absent any showing that renewal of the contracts would result in harm to listed species, *the rescission remedy ordered by the district*

> *court and affirmed by the court of appeals was inappropriate.*" (Federal Brief at 18; emphasis added.)

In short, Federal respondents again concur with the legal position expressed in the Petition for Writ of Certiorari. However, Federal respondents conclude that even though the Ninth Circuit's decision is wrong, this Court should not review it. The rationale seems to be that if water supply contracts for hundreds of thousands of acres of the nation's most productive farmland are rescinded Petitioners can simply sign new contracts. This reasoning ignores the fact that these new contracts may contain substantially different provisions than the rescinded contracts. As the Ninth Circuit noted in its opinion, there is no guarantee that Petitioners would receive the same amount of water under the same terms as they did under the previous contracts:

> "Even if the original contracts guaranteed a right to available water in the renewal contracts, the Bureau had discretion to alter key terms in the contracts, and might have been able to reduce the amount of water available for sale if necessary to comply with the ESA." (Appendix at 18.)

Since any new contracts entered into by Petitioners may be substantially modified, Federal respondents' attempt to discourage this Court from reviewing the Ninth Circuit opinion is unavailing: while more onerous contract terms may be of no consequence to the United States, they could be highly significant to the thousands of farmers who rely upon the Central Valley Project for their water supply. Indeed, section 3404(c) of the CVPIA limits the length of new contracts.

Federal respondents also contend that the issue of whether the implementation of the ESA's consultation requirement and a resultant "no jeopardy" finding moot a procedural violation of the consultation requirement, is

derivative of the rescission issue and thus does not warrant review. (Federal Brief at 19.) This assertion is hard to understand since Federal respondents *agree* with Petitioners that rescission is inappropriate. (Federal Brief at 18.) Federal respondents state that if rescission was inappropriate, then completion of the consultation process effectively rendered moot any controversy about the propriety of executing these contracts prior to the completion of consultation. (*Id.* at 19.) The Ninth Circuit's decision, however, is to the contrary: "Procedural violations of the ESA are not necessarily mooted by a finding by the FWS that a substantive violation of the ESA has not occurred." (Appendix at 24.) Frankly, Petitioners find Federal respondents' position that this Court not review a published appellate decision they believe to be wrong as a matter of law to be inexplicable.

Furthermore, Federal respondents' claim – understandably relegated to a footnote – that the Ninth Circuit's ruling on mootness presents no conflict with the decisions of the Fifth and Tenth Circuits, is wrong. As discussed at length in the Petition For Writ of Certiorari, both *Southern Utah Wilderness Alliance v. Smith*, 110 F. 3d 724 (10th Cir. 1997) and *Sierra Club v. Glickman*, 156 F. 3d 606 (5th Cir. 1998) directly hold that subsequent procedural compliance with ESA requirements *moots* a claim of procedural violation. (Pet. 20-22.) The Federal Brief attempts to distinguish these cases by arguing that the Ninth Circuit's decision rested on the Court's belief that rescission of the contracts was an available remedy and that the only relief sought in those cases was for the relevant federal agencies to engage in consultation. (Federal Brief at 19-20.) The *relief* sought in the cases is irrelevant to the mootness issue. The issue before both the Fifth and Tenth Circuits was identical to the issue faced by the Ninth Circuit in this case; *viz*, whether subsequent

procedural compliance with ESA requirement moots a claim of a procedural violation of the Act. In *Southern Utah Wilderness* the Tenth Circuit used a different standard in determining mootness, namely whether ordering further consultation would provide any meaningful relief. (110 F.3d at 728.) Similarly, the Fifth Circuit in *Glickman*, upon determining that there had been subsequent compliance with the ESA's provisions, found the issue of procedural violation moot. (156 F. 3d at 620.) In the present case, however, the Ninth Circuit *ignored* the issue of compliance and found no mootness because the *process* of consultation in and of itself was essential. (Appendix at 24.)

In short, the three circuits are in direct conflict on this highly important issue. The Fifth and Tenth circuits use a factual test to determine if there has been compliance with the ESA's procedural requirements. The Ninth Circuit ignores whether compliance has actually been achieved and bases its decision solely on process. Contrary to Federal respondents' assertion, the Ninth Circuit's decision was not based on the existence of rescission as a remedy. Rather, it conflicts with the decisions of the Fifth and Tenth Circuits because it focuses solely on whether the process of consultation was followed, not the substantive result. In these circumstances, review by this Court is appropriate to resolve this split among the circuits.

IV.

THE ISSUE OF FACIAL PREEMPTION IS RIPE FOR REVIEW

Federal respondents never contend that Petitioners are incorrect in concluding that CVPIA section 3406(c)(1) on its face precludes the application of California Fish

and Game Code section 5937 to the Friant Unit.[1] Indeed, Federal respondents *joined with the Petitioners* at the district court level in asserting that CVPIA section 3406(c)(1), on its face, preempts any possible application of section 5937 to the Friant Unit's operations. (Federal Brief at 11-12.) Despite the fact that Federal respondents agree with Petitioners on this legal issue, however, they urge the Court not to review the Ninth Circuit's decision. Apparently Federal respondents hope that, notwithstanding the Ninth Circuit's incorrect resolution of the facial preemption issue, the district court will resolve the section 5937 question on the merits in a manner that limits the effect of the Ninth Circuit's mistake. This argument provides no basis for denying review of the facial preemption question.

The issue presented is whether section 3406(c)(1) of the CVPIA *facially preempts* the application of section 5937, a purely legal question. The cases cited by Federal respondents involve situations where additional factual issues were still to be resolved by the district courts. In

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[1] California Fish and Game Code section 5937 provides:

> "The owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam. During the minimum flow of water in any river or stream, permission may be granted by the department to the owner of any dam to allow sufficient water to pass through a culvert, waste gate, or over or around the dam, to keep in good condition any fish that may be planted or exist below the dam, when, in the judgment of the department, it is impracticable or detrimental to the owner to pass the water through the fishway."

Brotherhood of Locomotive Firemen v. Bangor Aroostook Railroad Co., 389 U.S. 327, 328 (1967) (per curiam), for example, the Court held that the district court had improperly ruled without trying certain issues of fact. Thus, it was appropriate for this Court to withhold review until the factual issues in the case had been fully developed at the district court level. Similarly, in *Virginia Military Institute v. United States*, 508 U.S. 946 (1993), this Court withheld review of the constitutionality of the admission practices of an all male military school since the appellate court had remanded the case to allow the school to develop a plan that would comply with the constitutional requirement of equal protection. Again, review was declined in order to allow the lower court to more fully develop the facts of the case.

On the other hand, this Court has repeatedly held that cases presenting purely legal questions *are* ripe for review. (*Thomas v. Union Carbide Agricultural Products Co.*, 437 U.S. 568, 581 (1985); *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).) Even cases that are only *predominantly* legal, where further factual development will not be beneficial, are routinely considered ripe. (*Pacific Gas & Electric v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 201 (1983).) The issue of facial preemption presented by the Petition herein is a purely legal question. Since the Ninth Circuit deemed the issue ripe for review, and since there will be no further factual development on remand relative to the facial preemption issue, this Court should grant certiorari to review the facial preemption question.

V.

THE NINTH CIRCUIT ERRED IN CONCLUDING THE BUREAU OF RECLAMATION'S CONSULTATION WITH THE FISH AND WILDLIFE SERVICE WAS UNTIMELY

This Court should also review the Ninth Circuit's conclusion that the Bureau's consultation with FWS was untimely. Federal respondents misunderstand Petitioners' argument regarding the execution of the Friant contracts prior to the completion of the FWS's biological opinion. The Ninth Circuit misconstrued section 7(d) of the ESA as an *authorization* of agency action that otherwise would be prohibited.[2] To the contrary, however, section 7(d) is a limitation on certain types of agency action that may otherwise proceed pending consultation. Under the ESA, agency action may proceed forward even *after* consultation has been initiated unless the action involves an irreversible or irretrievable commitment of resources that forecloses the implementation of any reasonable and prudent measures that might otherwise be adopted. So long as an agency action does not involve such a commitment of resources, it is *irrelevant* whether consultation has begun. The Ninth Circuit's interpretation of section 7(d) turns the section on its head and provides an additional basis for review by this Court.

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[2] Section 7(d) of the ESA (16 U.S.C. § 1536(d)) provides:

> "After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section."

VI.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for Certiorari and review, *inter alia*, the issues that Petitioners and the Federal respondents agree were incorrectly resolved by the Ninth Circuit Court of Appeals.

Dated: February 19, 1999

Respectfully submitted,

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